Cox Communications Gulf Coast, L.L.C. *and* William R. Dalton *and* James S. Wilson. Cases 15–CA–16904 and 15–CA–17145

September 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On May 13, 2004, Administrative Law Judge George Carson II issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, and answering briefs. The Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

1. In adopting the judge's finding that the Respondent violated Section 8(a)(3) of the Act by discharging employee William Dalton, we find it unnecessary to rely on the judge's finding that the Respondent's antiunion animus is demonstrated by its communications to its employees about its commitment to remain union free and to protect itself and its employees from "the risks and costs of a union." Rather, we rely on the fact that the Respondent's stated reason for discharging Dalton, that he falsified his return to work note, was knowingly false. We find that the reason for the discharge is pretextual and, in the circumstances of this case, supports an inference that Dalton's discharge was motivated by his union activity.[4] *Shattuck Denn Mining Corp.*, 362 F.2d 466 (9th Cir. 1966); *Active Transportation*, 296 NLRB 431, 432 (1989), enfd. mem. 924 F.2d 1057 (6th Cir. 1991); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).[5]

2. In adopting the judge's finding that the Respondent did not unlawfully discharge employee Troy Giehll, we find that the record clearly demonstrates that Giehll would have been discharged even in the absence of his union activity. We note in particular that: the Respondent had an equal employment opportunity policy prohibiting discrimination and harassment; Giehll made highly charged and gratuitously offensive racial remarks to fellow employee Mark Graves; Graves became very upset by these remarks, reported them to the Respondent, and requested that Giehll be removed from Graves' work station; and that, upon subsequent questioning by the Respondent, Giehll admitted making the offensive racial remarks.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Cox Communications Gulf Coast, L.L.C., Fort Walton Beach, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

[1] No exceptions were filed to the judge's dismissal of the complaint allegations that: (a) the Respondent violated Sec. 8(a)(1) of the Act by denying employee William Dalton a promotion and discharging him because of his protected concerted activity, by unlawfully interrogating employee Troy Giehll, by discharging Giehll because he engaged in protected concerted activity, and by discharging employee James Wilson because of his protected concerted activity; (b) the Respondent violated Sec. 8(a)(3) by denying Dalton a promotion because of his union activity; and (c) the Respondent violated Sec. 8(a)(4) by denying Dalton a promotion and discharging him because he contacted the Board.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We will substitute a new notice to conform to the language set forth in the judge's recommended Order.

[4] In agreeing that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging employee William Dalton, Member Walsh would rely, as did the judge, on the Respondent's communications to its employees about its commitment to remain union free. Member Walsh finds that such statements may properly be used to demonstrate antiunion animus. See, e.g., *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999); *Gencorp*, 294 NLRB 717 fn. 1 (1989). In addition, Member Walsh agrees with his colleagues that the pretextual nature of Dalton's discharge supports an inference that the discharge was motivated by his union activity.

[5] Dalton's entitlement to backpay is to be determined by his actual ability (or inability) to perform his past or similar work during the backpay period. His claim for workers' compensation and/or his receipt of disability benefits is not determinative. See *Iron Workers Local 433 (Steel Fabricators)*, 341 NLRB No. 68, slip op. at 3 fn. 7 (2004), citing *Performance Friction Corp.*, 335 NLRB 1117, 1120 (2001).

Dated, Washington, D.C. September 30, 2004

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Communications Workers of America, AFL–CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer William R. Dalton full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make William R. Dalton whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the Board's decision.

WE WILL, within 14 days of the date of the Board's Order, remove from our files any reference to the unlawful discharge of William R. Dalton, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

COX COMMUNICATIONS GULF COAST, L.L.C.

Christopher J. Doyle, Esq., for the General Counsel.
Joseph M. Freeman and *Jill M. Wood, Esqs.*, for the Respondent.
William R. Dalton, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Mary Esther, Florida, on March 15, 16, and 17, 2004. The charge in Case 15–CA–16904 was filed on February 13, 2003, and was amended on April 23, 2003.[1] The charge in Case 15–CA–17145 was filed on September 18, 2003. The consolidated complaint issued on December 5, 2003. The complaint alleges that the Respondent interrogated an employee in violation of Section 8(a)(1) of the National Labor Relations Act, denied a promotion to William R. Dalton and discharged him in violation of Section 8(a)(1), (3), and (4) of the Act, discharged Troy Giehll in violation of Section 8(a)(1) and (3) of the Act, and discharged James S. Wilson in violation of Section 8(a)(1) of the Act. The Respondent's answer denies all the alleged violations of the Act. I find that the discharge of employee William R. Dalton violated Section 8(a)(3) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Cox Communications Gulf Coast, L.L.C. (the Company), is a Delaware limited liability corporation engaged in the operation of a cable television system from its facilities at Fort Walton Beach, Florida, at which it annually derives revenues in excess of $100,000 and at which it annually purchases and receives goods valued in excess of $50,000 directly from points located outside the State of Florida. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that Communications Workers of America, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

The Company provides cable television and high-speed internet service to customers in the Pensacola and Fort Walton Beach areas of western Florida. Employee classifications include customer service representatives (CSRs), who assist cus-

[1] All dates are in the year 2002 unless otherwise indicated.

tomers over the telephone, and field service representatives (FSRs), who go to the customer's location.

The employees of the Company are not organized. In early 2001, there was union activity at the Fort Walton Beach facility involving the International Brotherhood of Electrical Workers. No representation petition was filed. In May 2002, employee William R. Dalton contacted the Communications Workers of America (the Union).

Keith Gregory, vice president and general manager of the Company's Gulf Coast operations for the past 5 years, acknowledged that the Company provides all new employees with a document titled "Position Regarding Unions" that states that "Cox Communications intends to maintain [a] . . . union free environment." The "Position" states that the Company's procedures "are intended to provide an effective means for employees to offer ideas and suggestions or pursue questions or concerns they may have." New employees are also shown a video in which Jim Robbins, president of Cox Communications, the parent company, states the union-free policy and refers to the absence of "a need for third-party intervention."

Former Manager John Allen confirmed that, in implementing the foregoing policy, management keeps abreast of union activity among its employees. In 2002, when the Union began its organizational activity at the Fort Walton Beach facility and the Company heard of it, Director of Network Operations Mark O'Ceallaigh directed Allen and other top-level managers at the Fort Walton Beach facility to talk to the supervisors for whom they were responsible and to employees regarding whether they had "heard of any possible union activity."

Once management confirmed the existence of the organizational activity, it sent a letter dated June 19 to all of the Fort Walton Beach employees stating that the Company was "proud to say that no employee in Cox Gulf Coast is represented by a union" and that "[w]e will do everything the law permits to protect you and Cox from the risks and costs of a union." Thereafter, the Company distributed leaflets to employees relating to the Union and stating, in bold typeface, "DON'T SIGN UP" and "DON'T SIGN A CARD OR PETITION." The Company also held meetings with employees relating to the Union's organizational efforts. At a meeting in July, the Company handed out a laminated card that suggested questions for employees to ask union organizers and that bore the statement *"DON'T SIGN UP!"*

B. William R. Dalton

1. Facts

Field Service Representative William R. Dalton worked for the Company for over 17 years, from 1985 until he was terminated on September 24. In August 2000, Dalton sustained an on-the-job injury that required arthroscopic surgery. He returned to work in February 2001, but his medical problems persisted, and he went on an extended unpaid medical leave from June 16, 2001, until April 2002. After returning to work, Dalton contacted the Union in early May. Thereafter he advocated the Union among employees.

In the latter part of June, Dalton recalled attended a meeting in which General Manager Gregory and Director O'Ceallaigh addressed the employees regarding the Union and stressed the company policy regarding being responsive to employee concerns. Following that meeting, Dalton, on June 24, sent O'Ceallaigh a five-page document stating multiple concerns. Thereafter, Gregory and O'Ceallaigh met with Dalton and went through the concerns expressed in his document. Dalton testified that no commitment was made to take any specific action.

In 2002, Dalton was classified as a field service representative IV (FSR IV). In early July, he applied for a posted position, FSR IV contractor relations specialist. On Sunday, July 14, the Union held a meeting at a local restaurant. On July 15, Dalton's supervisor, Gary Iles, informed him that he had "pulled my . . . application," citing deficiencies in Dalton's performance. Dalton protested and wrote O'Ceallaigh on July 15 stating that the rejection of his application "was based on less than one month of performance," an apparent reference to his return to full duty following his return to work in April. The letter continues, stating, "It seems to be too much of a coincidence with all that has been going on lately and may be an issue for the NLRB and [E]EOC." Ten days later, on July 25, Dalton submitted a letter to Supervisor Iles in which he states, "I have consistently been denied advancement since my injury." This letter also refers to filing complaints with the EEOC and NLRB as well as instituting civil actions.

Following Dalton's submission of the foregoing letters, in late July, Human Resources Manager Debbie Revell, who works out of the Pensacola facility, came to the Fort Walton Beach facility. She and Director O'Ceallaigh met with Dalton to address the concerns that he raised in his written communications of July 15 and 25. Much of the conversation related to Dalton's physical condition. Revell explained to Dalton that his application had been pulled because he had not met the expectations of his current position; but, as an accommodation due to the short time since he had returned to work, she agreed that the Company would consider his performance prior to going on his leave of absence and would permit him to apply for the position. Following this meeting, on August 5, Dalton resubmitted his application for the FSR IV contractor relations specialist position.

On August 16, Dalton applied for another posted position, FSR IV Video +1. I do not credit Dalton's testimony that Iles also "pulled" his application for that position on July 15. His letter of July 15 refers only to the contractor relations position and that is the only position to which Manager Revell referred. If both positions had been the subject of Dalton's complaint, there would be no reason for the resubmissions to have occurred 11 days apart.

Dalton was interviewed for the Contractor Relations position on September 9, first by Manager John Allen, the supervisor of the position, and then by Human Resources Recruiter Marilyn Pratt. At the close of his interview with Manager Allen, Dalton recalls that Allen stated that he did not want any trouble in his department. Dalton asked if he was referring to his union activities, and Allen replied that he was not supposed to discuss the Union, that he thought the employees' problems "could be resolved without the interference of unions." Dalton stated that he disagreed. Thereafter, Dalton was interviewed by Human Resources Recruiter Pratt. At the conclusion of this interview,

he learned that the Contractor Relations position would be a lateral transfer without a raise in pay, and he requested that his name be removed from consideration.

On September 13, Dalton was interviewed for the FSR IV Video +1 position, first by the supervisors for whom he would work and then by Recruiter Pratt. In the interview with the supervisors, Dalton was asked about working up to 40 percent of the time in "core video" instead of high speed internet. Dalton replied that he would "not [be] happy about it but would do it if needed." At the interview with Recruiter Pratt, the interview format asks the candidate to recall a stressful situation that the candidate had encountered at work and discuss his or her reactions. When asked this question, Dalton noted that she had asked him that same question in the interview for the Contractor Relations position, and commented, "Did I lie or make something up." Pratt testified that many of Dalton's responses focused not upon the question she had asked but related to his personal complaints. Dalton was not selected for the position.

In June 2001, before beginning his extended leave of absence on June 16, 2001, and prior to any union activity, Dalton had applied for this same position and had not been selected.

Following the interview on September 13, Manager of Network and Field Operations Doug Blevins and Pratt held a feedback meeting with Dalton. Dalton recalls that Pratt informed him that he had exhibited a poor attitude in his interview, and Dalton stated that he thought she was referring to his union activities. Pratt did not reply to that statement. Blevins informed Dalton that he needed to sell himself, "show them that I wanted it [the job]." Dalton responded that Blevins' comment confirmed that employees needed a union to represent them and that he was going to "devote my time to union organizing activities from that point forward."

Pratt, in explaining to Dalton the reasons he was not selected for the position, noted that he had stated that he would "be unhappy" performing other than high speed internet work. She also pointed out to him that he had made various responses in the interview that she thought expressed a negative attitude. Her notes reflect that Dalton responded, "It's my attitude and I will not change it." The notes also reflect that Dalton said that he intended to file a grievance "with corporate" regarding his denial of the promotion, that he was "finished with interviews," that he did not intend to apply for any other position, and that he "[w]ill promote the union."

Dalton testified that he became upset as a result of the foregoing interview. He explained that he has diabetes and high blood pressure and, upon becoming upset, felt that he was "on the verge of an anxiety reaction." He consulted his physician at the White-Wilson Medical Center who directed that he remain out of work for a week.

On Monday, September 23, Dalton returned to the White-Wilson Medical Center in order to obtain a release to return to work. He was examined by Physician Assistant Tammy Howerton who wrote a release prohibiting him from working "with heavy duty equipment" and at "any heights above ground." Dalton read the note and noticed that it did not mention driving. He went to Howerton, who was speaking with another individual, and briefly interrupted her, asking whether he could drive and stating that his supervisor would want to know. Howerton told him that he could and continued talking to the individual. Dalton wrote, "may drive vehicle" on the work release, drove to the facility, and placed the note in the in-basket of his supervisor, Gary Iles. The following day he reported to work.

Supervisor Iles had been absent on September 23. When he arrived at work on September 24, he found the medical release. He observed the two different handwritings and what he considered to be an inconsistency in the release because "the heavy duty equipment that we have was our [service] vans." He testified that he felt that the "may drive vehicle" statement was inconsistent with the limitation regarding heavy duty equipment. Iles called Manager Blevins and Training and Safety Risk Manager Michael Cantwell and advised them of what he considered to be the inconsistency on the release. Blevins requested that Iles call White-Wilson Medical Center. Cantwell requested Dalton to bring in the original of the release. They spoke briefly. Dalton represented that he could drive doing "disconnects and training" but no "heavy work." Cantwell did not inform Dalton that the Company considered driving a service van to be operating "heavy duty equipment," the limitation stated on the medical release.

Iles denied talking to Physician Assistant Howerton, but testified that the "front desk nurse" checked and informed him that Dalton should not drive for a week. Iles reported to Manager Blevins that "the nurse" said that Dalton was not to drive. Howerton recalls speaking on the telephone with an individual who identified himself as Dalton's supervisor. She acknowledges that she "changed her mind" and stated that Dalton should not drive, but that she also informed the individual to whom she spoke that she had told Dalton that he could drive. I credit Howerton, but note that, even if I did not do so, the foregoing inconsistency is immaterial in view of subsequent events.

Director of Human Resources Charlene Fugate, who works at the Pensacola facility, was advised of the discrepancy. She instructed Blevins to find out "if, in fact, the doctor's note was being misrepresented," and that, if it was being misrepresented, the managers should proceed with termination. She testified to no further contact from any manager at the Fort Walton Beach facility.

Blevins went to the White-Wilson Medical Center and met with Howerton. Blevins showed her the two different handwritings, and Howerton confirmed that she had told Dalton that "it was okay for him to drive." At that point Blevins raised the issue of driving company vehicles and potential liability. Howerton, who acknowledges that she had changed her mind and informed the supervisor that Dalton should not drive, wrote a new work release which provided that Dalton was "limited to light duty to include no heavy duty machinery, no driving company car, no work above ground level." Blevins did not specifically deny that Howerton informed him that she had told Dalton that he could drive, testifying, "I don't remember that specific conversation." I credit Howerton and, in doing so, note that the restriction upon driving on the new medical release was limited to the driving of a *company* car.

At the end of the workday on September 24, Dalton met with Director O'Ceallaigh and Manager Blevins. When asked whether the "may drive vehicle" was his handwriting, Dalton acknowledged that it was and than added "that she [Howerton]

did tell me that I could drive." The Respondent, in its brief, overlooks this testimony and incorrectly states that Dalton "did not assert to Blevins and O'Ceallaigh that Howerton had allegedly told him he could drive as he now alleges." O'Ceallaigh told Dalton that he was fired. Dalton, who obviously was certain regarding what he had been told, responded that this was a misunderstanding, that "we can call Tammy . . . and clear this situation up." O'Ceallaigh replied that someone already had and that "you can go down to the clinic, you have all the time in the world." Blevins testified that the specific reason for the termination was "falsification of a work excuse record" which the Company considered to be a company document.

The following day, Dalton went to the White-Wilson Medical Center and informed Howerton of what had occurred. Howerton informed Dalton of her meeting with Blevins, noting that in that conversation Blevins had mentioned that the clinic could be held liable if Dalton had an accident driving a company vehicle. Dalton requested that Howerton call Revell to explain the situation, specifically that she had told him that he could drive. Howerton agreed to do so.

Howerton called Human Resources Manager Revell and informed her that she had discussed driving with Dalton and told him that "he could drive and I had no problem that he wrote that on my note." She stated that she thought there was "a misunderstanding" and wished that the Company would "reconsider his employment." Revell relied, "Thank you, we'll take this into consideration." Revell admitted that Howerton called her, explained that she had told Dalton that he could drive, and that she "thought it was okay for him to write that on the document."

The Company did not rescind Dalton's discharge.

Following his termination, Dalton, on December 16, filed a charge with the EEOC alleging discrimination because of his age and disabilities. He acknowledged that, even before the union organizational campaign, he felt he was being discriminated again for those reasons. On January 26, 2003, Dalton filed a claim with the Office of Federal Contract Compliance Programs alleging discrimination because of disability and status as a disabled veteran. The initial unfair labor practice charge filed by Dalton in Case 15–CA–16904 on February 13, 2003, did not include the denial of a promotion. The charge was amended to include the denial of promotion on April 23, 2003. On February 24, 2003, Dalton filed a workers compensation claim alleging that he had been temporarily totally disabled since September 13.

2. Analysis and concluding findings

The complaint alleges that Dalton was denied a promotion and terminated because of his protected concerted activities in violation of Section 8(a)(1), his union activities in violation of Section 8(a)(3), and his threat to file an unfair labor practice charge in violation of Section 8(a)(4) of the Act.

The General Counsel argues that the Respondent denied Dalton a promotion and terminated him because of the numerous complaints he raised on behalf of himself and others, his threats to contact the Board, and his union activities.

The Respondent contends that Dalton was denied the promotion because of the negative attitude he exhibited during the interviews for the position including specifically his expressed unhappiness with having to perform core video work and discharged him because he falsified a work excuse record, a company document. The Respondent does not dispute that Howerton informed Revell that she told Dalton he could drive, but contends that the "can drive vehicle" notation constituted a falsification because Dalton did not apprise Howerton that he was seeking a release to drive a company vehicle.

The Respondent further argues that the workers compensation claim filed by Dalton in February 2003 claiming total temporary disability as of September 13 destroys his credibility and that the doctrine of judicial estoppel bars any claim of an unfair labor practice after September 13. I concur that the claim of total disability diminishes Dalton's credibility, and I have carefully evaluated his testimony whenever it relates to a contested issue. The judicial estoppel argument would appear to relate to any eligibility for backpay during the period that Dalton has been found to be disabled and has been drawing disability benefits. It is not material to the issue of the Respondent's motivation for terminating his employment.

The Respondent additionally argues that the allegation regarding denial of a promotion is barred by Section 10(b) of the Act. The complaint alleges that the denial of the promotion constituted discrimination against Dalton because of his protected concerted activities, union activities, and threats to file a charge, the same conduct protected by the Act that is alleged as the reason for the alleged discriminatory discharge. See *Well-Bred Loaf*, 303 NLRB 1016 at fn. 1 (1991). It is well settled that amendments to a timely charge are deemed to relate back to the date of filing of the original charge, so long as the matters alleged are similar and arise out of the "same course of conduct" as is contained in the original charge. *Pankratz Forest Industries (Kelly-Goodwin Hardwood Co.)*, 269 NLRB 33 (1984). The denial of promotion allegation is not barred by Section 10(b).

With regard to the 8(a)(1) allegations, there is no probative evidence that the Respondent bears animus towards protected concerted activity unrelated to union activity. A critical component of the Respondent's antiunion policy is its willingness to address employees' concerns. The "Position Regarding Unions" specifically states that the Respondent's procedures "are intended to provide an effective means for employees to . . . pursue questions or concerns they may have." Consistent with that policy, General Manager Gregory and Director O'Ceallaigh met with Dalton in June to address the concerns he raised in the five-page document that he sent to O'Ceallaigh. Several of the concerns Dalton raised related to common concerns of FSRs, and these were discussed with Dalton. Contrary to the argument of the General Counsel, I find no basis for the assertion that Gregory and O'Ceallaigh were "surprised . . . that an employee would dare take them upon their word" by submitting complaints to them. The record is replete with instances in which employees have raised various concerns. Following the letters sent by Dalton protesting his exclusion from the application process, Managers Blevins and Revell met with him to address those concerns. Although the letters threatened that Dalton would contact the Board and the EEOC, neither Blevins nor Revell referred to those threats. Revell spoke with Dalton

regarding his concerns, chiefly his physical condition, and permitted him to resubmit his application for the FSR IV contractor relations position. The foregoing actions reveal that the Respondent is sensitive to employee concerns and seeks to respond in a fair manner to the concerns that employees raise in order to preclude the intervention of a "third party." I shall recommend that the independent 8(a)(1) allegations of denial of a promotion and termination because of Dalton's protected concerted activities be dismissed. As hereinafter discussed, I find that Dalton's discharge did violate Section 8(a)(3) of the Act; and there is, therefore, a derivative Section 8(a)(1) violation.

Regarding the 8(a)(4) allegations, Dalton's threat to contact the Board was coupled with a threat to contact the EEOC in his letter of July 15 and with a threat to contact the EEOC and institute private legal proceedings in his letter of July 25. Both letters followed the removal of his application for the FSR IV contractor relations specialist position. Dalton was permitted to resubmit his application and thereafter withdrew himself from consideration for the position. There is no complaint allegation relating the Contractor Relations position. After he was denied the FSR IV Video + 1 position, Dalton threatened only to file an internal grievance and devote his "time to union organizing activities." In *Trayco of S.C.*, 297 NLRB 630, 676 (1990), the Board affirmed the finding of the administrative law judge that an employee's discharge violated only Section 8(a)(1), although a previous discriminatory warning issued on the "basis of [the employer's] belief that the employee . . . [was] threatening to go to the Labor Board" was found to have violated Section 8(a)(1) and (4) of the Act. The evidences establishes no nexus between Dalton's threats to institute various legal proceedings, including contacting the Board, and the Respondent's denying him promotion to the FSR IV Video + 1 position or discharging him. I shall recommend that the 8(a)(4) allegations be dismissed.

In assessing the evidence relating to the alleged 8(a)(3) violations under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), I find that Dalton engaged in union activity and that the Respondent was aware of that activity.

An employer may lawfully oppose unionization. The fact that an employer, when publishing its policy opposing unionization or when addressing employees regarding its opposition to unionization, carefully phrases its antiunion statements so as to not threaten retaliation or promise benefits in violation of the Act, does not vitiate a finding of animus. See *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999); *Gencorp*, 294 NLRB 717 at fn. 1 (1989). The Respondent, upon learning of union organizational activity, directed its top-level managers to determine the extent of that activity. Thereafter, in its letter of June 19 and in meetings with employees, the Respondent emphasized its commitment to remain union free and protect itself and employees "from the risks and costs of a union." It sought to assure that no representation petition was filed by urging employees not to sign a card or petition. The foregoing conduct establishes that the Respondent bore animus towards employee union organizational activity.

The denial of the promotion to Dalton and his discharge were adverse actions. The General Counsel established a prima face case with regard to these alleged violations.

The Respondent established that Dalton would have been denied the promotion to the FSR IV video +1 position even in the absence of his union activity. Dalton had been denied promotion to this position previously, in June 2001, prior to engaging in union activity. He was on an extended leave of absence from June 16, 2001, until April. When Dalton was informed that up to 40 percent of the work of the position would be with "core video," he stated that he would "not [be] happy about it but would do it if needed." In his interview, many of Dalton's responses to questions focused upon his personal problems rather than the questions Recruiter Pratt was asking. His "did I lie or make something up" comment confirmed her assessment of Dalton's negative attitude. I find that the failure to promote Dalton related to management's nondiscriminatory determination that it should not place an employee with a negative attitude in a position in which he, by his own admission, would not be happy up to 40 percent of the time. I shall recommend that the allegation of discriminatory denial of a promotion be dismissed.

The Respondent has not established that it would have discharged Dalton in the absence of his union activity. Blevins testified that the Respondent discharged Dalton for falsification of a work release document, a company document. The medical excuse may well be considered to be a company document upon receipt by the Company. Initially, the document was the property of White-Wilson Medical Center. Dalton did not falsify the document. He altered it consistently with what Physician Assistant Howerton stated to him at the medical facility and prior to delivery to the Company. Howerton testified that, when she changed her mind and told the individual who identified himself as Dalton's supervisor that Dalton should not drive, she also told him that she had told Dalton that he could drive. Although she wrote a new medical release for Dalton following her conversation with Blevins, Howerton informed him that she had told Dalton that he could drive. Thereafter, Howerton informed Human Resources Manager Debbie Revell that she had told Dalton that he could drive.

The Respondent argues that Dalton "intentionally misled Howerton" by failing to explain to her that he "drove a large service van." I disagree. Dalton asked if he could drive, and Howerton told him he could. The work release stated that Dalton "is not to work with heavy duty equipment." Insofar as the Respondent considered service vans to be heavy duty equipment, the Respondent could simply have informed Dalton of that fact and assigned him other duties. Instead, Iles and then Blevins contacted Howerton, who admittedly changed her mind, and wrote a new work release prohibiting Dalton from driving a "company car." Despite Blevins' knowledge that Howerton had informed Dalton that he could drive, he and O'Ceallaigh terminated Dalton for falsification of a work release.

The Respondent argues that Blevins and O'Ceallaigh were simply carrying out the orders of Director of Human Resources Fugate who had informed them that they should terminate Dalton "if, in fact, the doctor's note was being misrepresented." Blevins knew that there had been no misrepresentation. Hower-

ton had informed him that she had told Dalton that he could drive. Dalton told Blevins and O'Ceallaigh that "she [Howerton] did tell me that I could drive," and, even after being told that he was terminated, persisted, stating that this was a misunderstanding, "we can call Tammy . . . and clear this situation up." Director Fugate testified to no further involvement in Dalton's termination, thus, Neither Blevins, O'Ceallaigh, or Revell brought Howerton's statements to Director Fugate's attention.

The Respondent's sensitivity to employee concerns does not include sensitivity to employee desires to obtain representation by a labor union. In the feedback session held on September 13, Dalton was confrontational. He stated that it was his attitude and he was not going to change it and that he was going to devote his time "to union organizing activities from that point forward," an activity that the Respondent opposed. Upon the Respondent's receipt the work release bearing the two different handwritings, Blevins believed that he had a legitimate basis for ridding the Respondent of Dalton who had stated his devotion to union organizing at the feedback session with Blevins only 11 days earlier. Despite Howerton's explanation to Blevins that she had told Dalton that he could drive, the Respondent proceeded with Dalton's termination, purportedly for falsification of the work release. After the termination, Howerton informed yet a third management official, Manager Revell, that she had told Dalton that he could drive and that "it was okay" for him to have conformed the document to reflect what she had told him.

Dalton falsified nothing. He altered the document consistently with what Howerton had told him prior to submitting it to the Respondent. Insofar as the Respondent considered driving a service van to be operating heavy duty equipment, Dalton could have been informed of that fact and prohibited from driving that heavy duty equipment. The Respondent's managers knew that the alteration was consistent with what Dalton had been told. Despite this, the Respondent terminated Dalton for falsification when, in fact, there was no falsification. The alteration was consistent with what Dalton had been told. When the reason given for a respondent's action is either false, or does not exist, the respondent has not rebutted General Counsel's prima facie case. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). I find that the Respondent terminated Dalton because of his union activity, specifically his announced intention to devote his time "to union organizing," in violation of Section 8(a)(3) of the Act.

C. Troy Giehll

1. Facts

Giehll worked for the Company as a field service representative from 1999 until September 23. His work took him to the homes and places of business of customers. Following an injury he sustained on July 5, Giehll was assigned light-duty work. Giehll attended the union meeting on July 14 and informed his supervisors that he had attended the meeting. He also reported that, at the meeting, employees had stated dissatisfaction with Manager Blevins as well as other issues. He acknowledged that he gave this information as a report of what occurred at the union meeting and that he was not speaking on behalf of any FSRs. In late July, O'Ceallaigh commented to Manager John Allen that Giehll was the "new mouthpiece for the field service group and he was a troublemaker."

The Company conducts a program referred to as "shadowing" so that employees are aware of the work being performed by employees in different classifications. Customer service representatives, CSRs, will be sent on a truck to work with field service representatives, FSRs, for a day, and FSRs will be sent to "shadow" CSRs who are dealing with customers over the telephone. Generally the FSR employee "shadowing" the CSR will wear a headphone in order to hear the description of the problem being given by the customer.

On September 17, Giehll was sent to the Pensacola office to shadow. Giehll testified that he was not assigned to the employee that he understood he was going to be shadowing. Instead he shadowed CSR Mark Graves, an African American employee, and CSR Robin Windham, a female employee.

CSR Graves handled a telephone call that proved to be quite frustrating, and, upon completion of the call, he commented to Giehll that it was difficult to get some customers to understand. Giehll agreed and related an incident involving a white customer who had made a racist remark when Giehll was at his house on a service call. Giehll repeated the racist remark, "that the VA [Veterans Administration] is nothing but a nigger welfare society," to Graves and said that the customer also made derogatory comments about Jews. Giehll then stated that he understood that the KKK [Ku Klux Klan] was active and holding meetings in Navarre, a town located midway between Pensacola and Fort Walton Beach. Giehll continued, referring to a controversy regarding the removal of a Confederate flag hanging at a memorial for Confederate soldiers in the town of Crestview, Florida, and stating he thought removal of the flag was wrong.

Graves had not responded in any way to the foregoing comments, but he became increasingly upset as the unsolicited comments continued. He went to his supervisor, Mark Lysek, and told him, "I need Troy [Giehll]to be removed from my desk." Supervisor Lysek asked why, and Graves reported the remarks that Giehll had made. He then went to compose himself. When he returned to his work station, Giehll was not there.

Giehll was then assigned to work with CSR Robin Windham. Windham, who did not testify, reported to her supervisor that Giehll brought up the organizational activities of the Union, that she stated to him that she did not "care to hear anything else about it." Despite this, Giehll continued to speak about the Union, asserting that the Company had changed a policy as a result of the July 14 union meeting. As she was handling calls from customers, Giehll interrupted her. Windham told him that she would obtain a headset for him so that he could hear what the customer was saying, but Giehll refused the offer. He continued to interject comments even though he could not hear what the customer was saying.

On September 20, Giehll was called to the office where Director O'Ceallaigh and Managers Blevins and Revell were present. Giehll recalls that O'Ceallaigh asked him why he would have quoted what a customer had said to a CSR. Giehll responded that they were exchanging worst-case scenarios. Asked if he had used the "N" word, Giehll acknowledged that he had. O'Ceallaigh then asked whether Giehll was aware that

he had offended his fellow employee, and Giehll answered, "No, I didn't." O'Ceallaigh told Giehll that the CSR had reported the racial remarks to his supervisor and that was "the reason for the meeting." O'Ceallaigh then asked Giehll if he had talked about the Union with a CSR and stated that he "approved of what the Union was talking about." Giehll acknowledged that he had.

Revell recalled that Blevins, not O'Ceallaigh, first questioned Giehll, and that the questioning began with Windham's complaints. Blevins asked why Giehll had kept interrupting Windham regarding "work procedures and the Union." Thereafter, O'Ceallaigh questioned Giehll about his conversation with Graves. After Giehll acknowledged his remarks, Revell asked why, out of the hundreds of customers that he had served, Giehll related the remarks of that particular customer. Giehll had no explanation. He did offer to publicly apologize.

Director of Human Resources Fugate testified that the Respondent has no tolerance for racial slurs. Human Resources Manager Revell reported to Fugate the racial comments to which Giehll admitted and they agreed that his conduct warranted termination.

Giehll was terminated on September 23. He testified that only Manager Blevins and his supervisor, Scott Honstetter, were present and that Blevins informed him that he "no longer met Cox standards." Giehll did not ask Blevins what he meant.[2] A memorandum dated September 23 signed by Manager Blevins and Supervisor Honstetter lists various derelictions by Giehll including the loss of company equipment and his interruptions of Windham and racial comments to Graves. Blevins testified that he was aware that Giehll had been disciplined for losing equipment but that the prior discipline was not the specific reason for the discharge. The payroll "Change Form" reflecting the termination of Giehll cites "unsatisfactory performance."

The Respondent's disciplinary policy provides examples of conduct that may be cause for immediate discharge including "[v]erbally or physically harassing, coercing, intimidating, or threatening a coworker . . . . The Respondent's Equal Opportunity Policy provides for maintenance of "a work environment free of discrimination and harassment."

Following his termination, Giehll filed a workers compensation claim alleging that he had been temporarily totally disabled since July 5.

2. Analysis and concluding findings

The complaint alleges that the Respondent unlawfully interrogated Giehll in violation of Section 8(a)(1) and discharged him in violation of Section 8(a)(1) and (3) of the Act.

The 8(a)(1) interrogation allegation is predicted upon Giehll's testimony that O'Ceallaigh asked whether he had mentioned the Union to CSR Windham and stated that he "approved of what the Union was talking about." Whether the question regarding talking about the Union with Windham was posed by O'Ceallaigh or Blevins, as Revell testified, is immaterial. Windham had written a complaint regarding Giehll's conduct, including continuing to talk about the Union after she had stated that she did not "care to hear anything else about it" and interrupting her. Giehll's testimony establishes that no inquiry was made about the Union other than in the context of the remarks that he purportedly addressed to Windham. "An employer's failure to adequately investigate an employee's alleged misconduct has been found to be an indicial of discriminatory intent." *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988). If the Respondent were to fairly investigate Windham's complaint, managers had to ask Giehll whether he had made the comments that Windham attributed to him. I shall recommend that this allegation be dismissed.

There is no evidence that the Respondent bears animus towards employee protected concerted activity as opposed to union activity. There is no probative evidence that Giehll engaged in protected concerted activity unrelated to his union activity. The comment attributed to O'Ceallaigh by former Manager Allen relating to Giehll being the "new mouthpiece" for the FSRs referred to no specific statement and Giehll, when reporting what had occurred at the union meeting to various supervisors, acknowledged that the was not speaking on behalf of the FSRs. O'Ceallaigh's reference to Giehll being a "troublemaker" is confirmed by Giehll's racial comments to CSR Graves. I shall recommend that the independent 8(a)(1) allegation that Giehll was discharged because he engaged in protected concerted activity be dismissed.

The record establishes that Giehll engaged in union activity and that the Respondent was aware of activity. As already discussed, the Respondent's activities in response to the Union's organizational efforts establish animus, as does the unlawful termination of Dalton because of his union activity. The termination of Giehll was an adverse action that directly affected his employment. I find that the General Counsel has established a prima facie case.

The difficulty that Graves encountered with the customer to whom he was speaking was getting him to understand what Graves was trying to explain to him. The racist remarks that Giehll attributed to the customer to whom he referred did not relate to any problem regarding communicating with the customer concerning a technical problem. Giehll's claim that he and Graves were exchanging worst-case scenarios was, therefore, incorrect. Having shared the racist comment that Giehll attributed to a customer, he continued making unsolicited comments, referring to the Klan, and then raising the matter of the flying of the Confederate flag at a Civil War memorial and stating that he agreed with those who opposed its removal. I need not burden this decision with an extended discussion of the offensiveness of the "N" word, the Klan's racial hatred, or the passions ignited by controversy over the Confederate flag, most recently in South Carolina and Georgia.

The General Counsel, in his brief, argues that the "Respondent failed to elicit testimony from the employee it claims was offended by Giehll's statements about race." Contrary to the foregoing, Graves was called as a witness by the Respondent and testified credibly that his "background was attacked," that Giehll's remarks made him "nervous a little bit," and that he

[2] Blevins, when testifying pursuant to Sec. 611(c), implicitly placed Director O'Ceallaigh in the meeting when he testified that O'Ceallaigh informed Giehll that he was terminated for "racial slurs and race baiting." Giehll specifically testified that O'Cealleigh was not present, O'Cealleigh did not testify, and Blevins was not called by the Respondent to dispute Giehll's testimony.

did not "want people coming after me." The foregoing testimony and Grave's contemporaneous complaint to his supervisor confirm that he was harassed and intimidated by Giehll.

The Respondent's Equal Opportunity Policy provides for maintenance of "a work environment free of discrimination and harassment." The Respondent's disciplinary policy provides that "[v]erbally or physically harassing, coercing, intimidating, or threatening a coworker . . . may be cause for immediate discharge. Graves reported Giehll's remarks and requested that he "be removed" from his workstation. Director of Human Resources Fugate was appalled at the language used by Giehll and agreed with Revell that Giehll's conduct warranted termination. Director Fugate explained that she had been peripherally involved in an EEOC matter inherited by Cox when it acquired another company and that, for that reason, she was sensitive to EEO matters and "we just simply do not have tolerance for racial slurs."

The General Counsel argues that the Respondent has given shifting reasons for Giehll's termination in that the payroll "Change Form" reflecting the termination cites "unsatisfactory performance" rather than racial slurs and that Giehll was never told a specific reason for his termination. I find no significance to the entry on the payroll change form. Giehll did not testify that he did not know why he was terminated. He testified only that he was never specifically told why he was terminated, that Blevins told him that he "no longer met Cox standards." Giehll admitted that he did not ask Blevins what he meant. The only logical reason that he would not ask was because he knew that his termination was a direct result of his conduct at Pensacola on September 17. He was questioned about that conduct on Friday, September 20, and admitted that, at that meeting, after denying that he was aware that he had offended Graves, was informed by O'Ceallaigh that Graves had reported his comments to his supervisor and that was "the reason for the meeting." Giehll was terminated on the next workday, September 23.

Although there is no evidence that any other employee has been disciplined for similar comments, there is no evidence that any other employee has made similar comments. See *Bell Halter, Inc.*, 276 NLRB 1208, 1223 (1985). The Respondent has established that it has no tolerance for the conduct in which Giehll engaged. See *Certainteed Corp.*, 282 NLRB 1101, 1120 (1987). Notwithstanding the Respondent's animus towards union activity, the evidence does not establish that Giehll's union activity was a substantial and motivating factor for its action. *Manno Electric*, 321 NLRB 278 (1996). I find that Respondent has met its burden of establishing that Giehll would have been terminated because of his conduct even in the absence of his union activities. See *Shepherd Tissue, Inc.*, 327 NLRB 98, 99 (1998). I shall recommend that this allegation be dismissed.

D. James S. Wilson

1. Facts

James Wilson was employed as a plant maintenance technician from 1997 until his termination on August 5, 2003. There is no evidence that Wilson was involved in any union activities.

The Company holds biweekly meetings with plant maintenance technicians, a total of about 20 employees. At one of these meetings in March 2003, Supervisor Richard Wragg informed employees that they would have to start calling in when they went on their lunch break and then call in when the break ended. Employee Charles Martin stated that Manager Doug Blevins had said the employees would not have to do that. Blevins, who was at the meeting, responded that he had not made that statement, and Wilson entered the dispute, stating, "Yes you did, Doug . . . we all heard you say it." The following day, Supervisor Wragg informed Wilson that he was giving him a verbal reprimand "for getting people in the meeting agitated." Wragg said that another employee, whom he refused to identify, was also receiving a verbal reprimand. Wilson responded that he did not consider it fair or right. Wilson's most recent evaluation, for the period ending March 31, 2003, reflects a rating of 4.9 out of a possible 5.0.

Wilson testified that he and the other employees ceased raising issues at the biweekly meetings after March 2003, but that he continued to raise various issues with his supervisors, Ken Vandervort and Randy Ross, before and after the biweekly meetings including performing ingress repairs (repairs that required entering a customer's home), increasing standby pay, requiring plant maintenance technicians to perform cable locates, and requiring plant maintenance technicians to defilter cables. He acknowledged that, on these occasions, other employees were present and raised the same concerns. Supervisor Randy Ross confirmed that the plant maintenance technicians raised these issues as a "as a group." Wilson was not their chief spokesperson. The individuals that he recalled raising these issues included Danny Byrd and Jimmy Robertson, the two senior technicians, and Mike Scott and Lloyd Strahan. He denied that any discipline was taken against any technician for raising those issues, and there is no evidence to the contrary. He did not specifically recall Wilson raising those issues, but his acknowledgment that the technicians raised the issues "as a group" does not contradict Wilson.

Supervisor Gary Iles, who as an employee was involved in the 2001 organizational activity involving the International Brotherhood of Electrical Workers, testified that he had raised numerous complaints as an FSR but that he suffered no adverse actions. Similarly, current Supervisor Ronnie Bryant raised issues concerning pay, safety, and working at night on behalf of himself and other employees prior to his promotion to a supervisory position.

At some point between March and August 2003, following one of the bimonthly meetings, Director O'Ceallaigh told Wilson that he appreciated how positive he had been and to keep up the good work. He presented him with a gift card for merchandise at Home Depot.

In 2001, Wilson had been disciplined for alleged inappropriate comments made to the teenaged daughter of a customer. The teenager was a minor, and the report that was the basis for the discipline was made by the teenager's mother. The minor's father refused to permit his daughter to be questioned regarding the incident. Wilson acknowledged conversing with the teenager but denied making any inappropriate comments. He characterized the conversation as "lighthearted." According to for-

mer Manager John Allen the warning was issued to protect the Company in the event of a lawsuit. The warning letter provides that similar future allegations "may lead to disciplinary action up to and including termination."

In late July 2003, employee Linda Scott was attempting to solve a problem that Supervisor Ross was having with his computer. She was at his workstation, working on his computer, when Wilson came up, put his fingers in her hair, a ponytail, pulled on it, and asked, "How long are you going to grow that." Scott responded, "I don't really know." Wilson then commented upon her watch, asking, "Is that a man's watch?" Wilson states that she removed the watch and let him look at it. Scott did not testify to doing so, but she does recall that she responded that the watch was a man's watch, but that she did not think that it mattered. Wilson then stated, "[Y]ou're one of them, aren't you . . . I've always wondered about you, I've always heard rumors about you, but I never knew." The foregoing incident bothered Scott. After thinking about it for a couple of days she reported the incident to her supervisor, Andy Lyublanovits, because she did not feel that "he had any right to touch me or make comments about my personal life."

Supervisor Lyublanovits advised Director of Human Resources Fugate of Scott's report. Fugate asked Manager Revell to investigate. Revell spoke with Scott who recounted the incident. Scott also informed Revell that she had heard that Wilson had made other inappropriate comments. At that time she did not state who might have heard the comments. Later that day, Fugate informed Revell that she had spoken with Scott and that Scott had given her the names of two employees who may have overheard other comments by Wilson. Revell contacted those employees and learned that they had overheard Wilson, who was speaking with some male employees, but loudly enough for them hear. Supervisor Christine Six heard Wilson describe a fellow female employee as "the one with the big tits." Six testified that she was "in shock and disbelief" and that she handled the situation "very poorly" in that she did not immediately report the incident "like I should have."

Manager Revell reviewed Wilson's personnel file, which contained the final warning for the incident in 2001 as well as an incident in which he referred to Supervisor James Dixon, who is an African American, as "pimp daddy." Supervisor Dixon did not report that incident, but Wilson's supervisor, Ken Vandervort, overheard the comment, reported it, and counseled Wilson regarding it.

On August 4, 2003, Wilson met with Manager Doug Blevins and his supervisors Ken Vandervort and Randy Ross. Asked if he recalled a conversation about a man's watch with Linda Scott, Wilson answered that he did, that she "took it off and showed it to him." Asked if he remembered saying anything about her hair or touching it, Wilson responded that he did not remember, but he could have, explaining that he had, at one time in the past, been a hair dresser. When asked whether he recalled stating to Scott, "Oh, you're one of them," Wilson answered that he did not recall making any such comment. Wilson was sent home.

As he was walking to his vehicle with Supervisors Vandervort and Ross, Wilson stated that if he had offended Scott he would apologize. Supervisor Vandervort went to report that offer to Blevins. Wilson then asked if Ross heard him "say that." Ross answered, "Yes, but I can't talk about it." Supervisor Vandervort returned and told Wilson not to contact Scott.

Upon arriving home, Wilson sent an e-mail to management stating that he "in no way meant to make anyone feel uncomfortable" by his "statements/actions" and that in the future he would engage only in work related conversations. When questioned at the hearing regarding whether his asking Scott if she was wearing a man's watch was intended to make her [un]comfortable, Wilson answered that he "was not trying to make her feel [un]comfortable at that particular time. I was—we were just having lighthearted conversation."

On August 5, 2003, Wilson was called to the facility. He met with Managers Debbie Revell, Doug Blevins, and Director Mark O'Ceallaigh. Revell asked Wilson if he recalled attending sensitivity training. Wilson replied that he did not, and Revell showed him his signature upon a document reflecting his attendance. Revell asked whether he recalled making a comment about a female employee's "posterior," and Wilson denied having done so. At the hearing, Wilson explained that he and the female employee who Revell had named were on a softball team and he acknowledged having made "lighthearted" comments to her, but not in the workplace. Wilson admitted that, shortly after the meeting began, he realized that he was to be terminated and became quite agitated. He recalled few aspects of the meeting other than the two foregoing questions that Revell asked him. He acknowledged that he "never really gave anyone a chance" to explain the reason for his termination. He recalls that he questioned why he was being terminated "for one offense" whereas a fellow employee, Mark McDowell, had not been terminated.

Wilson's reference to one offense was incorrect. He had the prior warning stating that any similar future allegations "may lead to disciplinary action up to and including termination." Former Supervisor Gary Iles, who resigned his position, testified that McDowell had three final warnings in his file and was not terminated. There is no documentary evidence in the record relating to those warnings. Illes' description of each warning reveals three offenses that were separate in character, a vehicle accident, failure to properly maintain his equipment, and inappropriate sexual comments. Iles was not privy to all discussions in the investigations of McDowell's misconduct. Unlike Wilson, there is no evidence that McDowell made further inappropriate sexual comments. Wilson, like McDowell, had not been terminated for a first offense.

On August 22, 2003, Wilson called Revell to inquire about his eligibility for unemployment compensation. In their conversation, Revell confirmed to Wilson that he had been terminated for "a pattern of inappropriate language."

2. Analysis and concluding findings

The complaint alleges that Wilson was discharged in retaliation for his protected concerted activities.

The record establishes no animosity towards employees who raised complaints either individually or concertedly. The Respondent seeks, as it did with Dalton in June and July 2002, to respond in a fair manner to the concerns that employees raise in order to preclude the intervention of a "third party." The verbal

reprimand given to Wilson in March 2003 followed his interjection of a comment into the dispute between Blevins and employee Charles Martin. Wilson disputed Blevins' denial to Martin that he had stated that a preexisting practice would not be changed. Assuming that the foregoing constituted protected concerted activity, there is no evidence that this single incident establishes animus towards raising concerted complaints. Wilson received a rating of 4.9 out of a possible 5 shortly after the reprimand. Wilson and other employees continued to raise matters of common concern after March 2003 with no evidence of any retaliation. In *CWI of Maryland, Inc.*, 325 NLRB 791 (1998), Board Member Hurtgen noted that "[i]t does not necessarily follow that a respondent who retaliates against union activity is predisposed to interfere with the exercise of nonunion activities protect by Sec. 7 as well." Id. at fn. 1. In *New Orleans Cold Storage Co.*, 326 NLRB 1471 at fn. 1 (1998), the Board held that specific animus regarding the protected activity of one employee did not justify "generalized characterizations" beyond the specific animus that was established. In this case, there is no probative evidence of animus towards employees who concertedly raised concerns about working conditions so long as that activity was unrelated to union activity.

The evidence does not establish that Wilson's activities were different in character or degree from the actions of other plant maintenance technicians. Nor does the evidence establish that the Respondent bore animus towards protected concerted activity that was unrelated to union activity. The General Counsel has failed to establish a prima facie case, and I shall recommend that the allegation that Wilson was terminated in retaliation for engaging in protected concerted activity in violation of Section 8(a)(1) be dismissed.

Even if I assume that the General Counsel established a prima facie case, the Respondent has established that it would have terminated Wilson in the absence of any protected concerted activity on his part.

Upon receipt of the report concerning Wilson's conduct towards Scott from Supervisor Lyublanovits, Director Fugate directed Manager Revell to investigate. When interviewing Scott regarding what had occurred, Revell learned that Wilson had made other inappropriate remarks. Contrary to the assertion in the brief of the General Counsel that "only one other time" had Wilson allegedly used inappropriate language in the workplace, Revell's investigation disclosed the comment overheard by Supervisor Six and review of his personnel file revealed the prior warning in 2001 as well as the "pimp daddy" comment about which Supervisor Vandervort had counseled Wilson. There is no evidence that the investigation was "biased, negligent, or cursory." *Westinghouse Electric Corp.*, 277 NLRB 136, 137 (1985).

The General Counsel contends that Wilson should only have been warned. Wilson had received a final warning in 2001. As already noted, the Respondent's policy provides that "[v]erbally or physically harassing . . . a coworker" may be cause for immediate termination. The General Counsel also argues that Wilson was treated disparately as compared to employee Mark McDowell. There is no documentary evidence relating to McDowell, and Iles acknowledged that he was not privy to all aspects of the investigations of McDowell's offenses. Accepting the testimonial evidence before me, McDowell, like Wilson, had received a final warning regarding inappropriate sexually related comments. Unlike Wilson, there is no evidence that he thereafter made any such comments. The foregoing evidence is insufficient to support an inference of discrimination.

When Blevins, Vandervort, and Ross met with Wilson, he admitted the encounter but did not recall his reference to Scott being "one of them." Both Scott and Supervisor Ross did recall the remark. Revell's investigation disclosed a pattern of conduct. When testifying, Wilson referred to making "lighthearted" conversation or comments in his encounter with the teenager, with Scott, and with his female softball teammate. It appears that the individuals to whom he directed his remarks did not share his "lighthearted" characterization. As with racial remarks, the Respondent takes seriously incidents of inappropriate sexual remarks. Consistent with its policies, the Respondent terminated Wilson. Wilson, in an agitated state, did not permit the managers to continue to fully explain the reasons for the termination.

Even if I were to assume that Respondent bore animus towards employees who engaged in protected concerted activity, I would find that the Respondent established that it would have taken the same action against Wilson in the absence of any such activity. I shall recommend that the allegation that Wilson was terminated in violation of Section 8(a)(1) of the Act because he engaged in protected concerted activities be dismissed.

CONCLUSION OF LAW

By discharging William R. Dalton because of his union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged William R. Dalton it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from September 24, 2002, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Cox Communications Gulf Coast, L.L.C., Fort Walton Beach, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee because of that employee's membership in or activities on behalf of the Communications Workers of America, AFL–CIO, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer William R. Dalton full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make whole William R. Dalton for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify William R. Dalton in writing that this has been done and that the layoff will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Fort Walton Beach, Florida, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 24, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 13, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you because of your membership in or activities on behalf of the Communications Workers of America, AFL–CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer William R. Dalton full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

COX COMMUNICATIONS GULF COAST, L.L.C.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."